IN THE

Supreme Court of the United States

October Term, 1962

Nos. 108, 109, 110, 125

INTERSTATE COMMERCE COMMISSION,
v. *Appellant in 108*

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, ET AL.

SEA-LAND SERVICE, INC.,
v. *Appellant in 109*

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, ET AL.

SEATRAIN LINES, INC.,
v. *Appellant in 110*

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, ET AL.

UNITED STATES OF AMERICA,
v. *Appellant in 125*

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, ET AL.

On Appeal From the United States District Court for the District of Connecticut

BRIEF OF THE APPELLEES

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF OF THE APPELLEES

I
THE STATUTES INVOLVED

The statutes which are involved are set forth in the Appendix to the brief of the United States. Of these, Section 15a(3) of the Interstate Commerce Act,[1] is the cardinal one. It reads:

> "In a proceeding involving competition between carriers of different modes of transportation subject to this Act, the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act."

II
THE QUESTION

Did the Court below properly set aside as unlawful under Section 15a(3) of the Interstate Commerce Act an order of the Interstate Commerce Commission which required the cancellation of compensatory reduced rail trailer-on-flatcar (TOFC) rates published on parity levels to meet rates of Sea-Land Service, Inc. for its newly established coastwise trailership service, and which further required such TOFC rates to be pegged 6 percent higher than the comparable Sea-Land rates to be lawful, where the only basis for the Commission's action was that Sea-Land, and Seatrain Lines, Inc., another coastwise water carrier, needed the protection of pricing differentials in their favor to maintain rates which would enable them to continue efficient and economical service of benefit to the nation's commerce and defense?

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1. 49 U. S. C. § 15a(3). Section 15a(3) was incorporated into the Interstate Commerce Act by the Transportation Act of 1958, 72 Stat. 572.

III

STATEMENT

This brief will answer the briefs of the several appellants.[2]

The briefs of the Commission and the United States,[3] to a large extent, describe fairly the background and nature of the pricing controversy, the proceedings before the Commission and the actions taken by it. But the report of the Commission (R. 4) contains findings upon the record before it not commented upon by any of the appellants which are of considerable significance and which place the TOFC rate reductions of the railroads in the correct perspective.

When Sea-Land (formerly Pan-Atlantic Steamship Corp.) began its new trailership operation between the east, on the one hand, and the southern and southwestern states, on the other, which offered the shippers and consignees a service "closely akin to railroad trailer-on-flatcar service with the substitution of the deck or the hold of a vessel for the rail flat-car" (R. 8), it published a line of commodity rates 5 percent to 7 percent lower than the corresponding

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2. Briefs were received from: Sea-Land Service, Inc., appellant in No. 109, on January 8, 1963; Seatrain Lines, Inc., appellant in No. 110, on January 10, 1963; the Interstate Commerce Commission, appellant in No. 108, on January 11, 1963; the United States, appellant in No. 125, on January 11, 1963; Waterways Freight Bureau, an *amicus curiae*, on January 9, 1963; and from the American Trucking Associations, Inc., another *amicus curiae*, on January 9, 1963. All of these will be answered to the extent that answer is required in this one brief of the appellees. Since the brief of the United States in many respects advances the position of these appellees and admits that the determination of the Court below was correct, although disagreeing with portions of the *obiter dicta* of that Court, some of the arguments, positions and authorities set forth by the Government will be adopted by these railroads to avoid unnecessary repetition.

3. With the exception of the brief of the United States, the briefs of the several appellants and *amici* supporting them, are substantially similar.

all-rail boxcar rates. Some 700 of these reduced Sea-Land rates were placed under investigation by the Commission and their lawfulness was considered on a consolidated basis with the lawfulness of the 66 TOFC rates which are the subject of the litigation here. All of these reduced Sea-Land rates, with the exception of a few found to be non-compensatory, were held to be lawful by the Commission and are presently in effect.

Sea-Land's new service posed a serious competitive threat to the railroads because it, like that of the motor carriers, offered the shippers virtually damage free door-to-door transportation in highway-type containers, with the loading and unloading being done by the carrier. By contrast, shipping in boxcars required the shippers and consignees to load and unload the lading at their own expense, with the incidence of damage being far greater than when highway type containers were used. Where the shippers and consignees employing boxcars were without rail sidings, local drayage was required, thus adding expense not incurred with the use of Sea-Land (R. 193). Because of the differences in the quality of the two services, and particularly since Sea-Land's rates included transportation services not covered by the boxcar rates, the railroads were of the belief that their higher priced, lower quality, boxcar services were at a competitive disadvantage.

But they had another service, namely TOFC, which was virtually the counterpart of Sea-Land's. Within the area in which Sea-Land was affording new cut-rate competition, TOFC service, however, was priced higher than rail boxcar service. Since Sea-Land had discounted the rail boxcar pricing by 5 percent to 7 percent, it enjoyed an even greater pricing advantage with respect to TOFC. As the Commission found, ". . . the railroads were convinced that they could not compete without a reduction in the TOFC rates . . ." and therefore, decided on a trial basis to publish a limited number ". . . of TOFC rates on the same level as the sea-land rates, . . ." (R. 19). This the Commission

found was done upon the assumption ". . . . that these two operations, which have many of the characteristics of overland motor-carrier service, are equivalents from the quality standpoint, and that therefore, in the absence of special circumstances, they should be priced at the same levels" (R. 19).

The railroads' TOFC reductions must, therefore, be viewed as fairly made in the tradition of business generally for the purpose of meeting a new competitive threat. It is noteworthy that nowhere in the several reports of the Examiner who first considered the lawfulness of the Sea-Land and TOFC reductions, or in the Division's report that preceded the Commission's final report, or in the final report itself, is there any finding, observation or inference that the rail reductions were made for the purpose of destroying Sea-Land or any other water carrier, or that such reductions were predatory in that sense. Further, it should be noted that while the Commission concluded that Sea-Land requires pricing differentials in its favor to successfully compete (R. 41), it found that as an inducement to use Sea-Land versus rail service ". . . . [t]he most important, and usually the determinative factor to the shippers as a whole is the measure of the rates" (R. 13). In other words, despite varying appraisals of the shippers of the relative qualities of the competing services, the factor most strongly motivating the selection of one over the other was the level of the price at which it was offered (R. 45).

While some of the appellants here have inferred that the TOFC reductions in some way contravene the pricing policies of this nation because they were selective in the sense that they only apply where Sea-Land competition existed and did not have application to interior points,[4] the Department of Justice, which has responsibility for enforcing fair pricing practices throughout a large segment of

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4. See e.g., briefs of Seatrain at 12, Sea-Land at 8, and Waterways Freight Bureau at 27.

American business and commerce, in its brief unequivocally states that such spot adjustments to meet competition are "permissible" under the Interstate Commerce Act and in support refers to a congressional staff study which observed ". . . freedom to make such spot rates of this type is historic."[5]

Turning only briefly to the costs, because they were not relied upon by the Commission in condemning the TOFC rates, there is no dispute with the finding that the TOFC rates were shown to be compensatory (R. 34). As to relative costs, the Commission found that the Sea-Land costs, compared with those of rail TOFC service, were somewhat lower (R. 36). But what may be overlooked is the conclusion of the Commission's Cost Section that, comparing rail boxcar costs with those of Sea-Land, the record showed ". . . that for most of the movements where rail costs are shown, the Sea-Land costs exceed the all-rail costs of boxcar service, and that this relationship is more pronounced at higher minimum weights" (R. 17).[6]

But the significant thing about the costs is that the Commission clearly stated that it could not ". . . determine on these records where the inherent advantages [i.e. relative cost advantages] may lie as to any of the rates in issue" and that the condemnation of the reduced TOFC

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5. Brief of United States, n. 8, at 21.

6. Sea-Land introduced costs for the 700 movements, the rates of which were under investigation in the several consolidated dockets. For many of these, where there were comparable rail boxcar movements, i.e., where the railroads published commodity rates at reasonably comparable minimum weights, Sea-Land also submitted rail boxcar costs (R. 206). For such rail movements the railroads also presented their costs (R. 207). These compared costs showed that in most instances the railroads for boxcar movements, had the economic advantage of lower costs (R. 17). Since the legality of the boxcar rates was not in issue and the railroads were not seeking the prescription of differentials in their favor, their purpose in presenting the lower cost showing was to negate any claim that Sea-Land might have made that it had an inherent advantage of lower cost and thus might be entitled to differentials in its favor (R. 15).

rates was based upon "other considerations" appearing to it "determinative of the issues" (R. 37).[7]

In summary, the Commission's conclusion that the TOFC rates at parity with the Sea-Land rates were unlawful, and would only be lawful if artificially pegged to provide Sea-Land with a 6 percent differential in its favor, was not based on any finding that the TOFC rates were: noncompensatory; predatory in the sense of being intended to harm or destroy a competitor; improperly selective; or that they would impair or destroy an inherent cost advantage enjoyed by Sea-Land or Seatrain. Rather they were found unlawful solely because they would divert traffic from those water carriers and, if extended on a broad scale, would make it difficult for them to continue in operation. This the Commission concluded, threatened the continued existence of coastwise water service to the detriment of the public interest in preserving such service. The Court below held the basis used by the Commission was unlawful because of the provisions of Section 15a(3) of the Interstate Commerce Act (R. 249).

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7. While the Court below and the United States, in its brief, both indicate that the preservation of an inherent advantage of lower costs provides a basis for the Commission's prescribing differentials to protect the lower cost carrier's pricing structure from erosion by pricing reductions of the higher cost agency, none of the appellants is here claiming that the Commission's action was justified on such a basis. The entire thrust of the argument of Sea-Land, for example, is to the effect that the protection of the low cost advantage is only a factor along with others to be considered, and that it can be ignored in determining whether the traffic of one mode should be protected from pricing reductions of another. (Brief of Sea-Land beginning at 15.)

IV
SUMMARY OF ARGUMENT

The Court below correctly held that the Commission by the provisions of Section 15a(3) of the Interstate Commerce Act, was precluded from finding unlawful reduced compensatory TOFC pricing where the basis for its so doing was its conclusion that the pricing reductions would create difficulties for the coastwise water carriers in continuing to provide efficient and economical services and would thus threaten their existence. This holding of the Court below with respect to the limitation that Section 15a(3) imposes upon the Commission's powers to hold unlawful pricing reductions of competitors of different modes of transportation is fully sustained by the legislative history of the Section and is consistent with the purposes and objectives of the Congress in enacting the new rule of rate-making.

The Commission may not—as the Court below held—by relying upon the end objective of the National Transportation Policy that a transportation system adequate for the commerce and defense of the United States be preserved, deviate from the specific mandates of the policy itself or the requirements of the implementing provisions of the Interstate Commerce Act. But even assuming the Commission might do this in the extraordinary circumstances where pricing differentials are required to preserve a particular carrier uniquely essential to the national defense which could not otherwise survive, it did not include findings sufficient to establish that such extraordinary circumstances were here present.

Contrary to the arguments of some of the appellants, the Court below did not hold that the only lawful basis for condemning reduced intermode competitive pricing is the protection of an inherent low cost advantage of one mode. Rather, the Court made it plain that pricing which involves "practices other than the normal incidents of fair competition" may be outlawed as being embraced within the National Transportation Policy's mandate to the Commis-

sion to administer the Act to avoid "unfair or destructive competitive practices". While the Court, in holding that reduced pricing, which will divert substantial traffic from another mode and thereby threaten its ability to continue operations does not, by the terms of Section 15a(3), as interpreted in the light of its legislative history, constitute a proscribed "unfair or destructive competitive practice", it has given an example of a pricing practice that would be reached by such proscription. Non-compensatory rates, the Court has indicated would be unlawful since they amount to an unfair or destructive competitive practice. Other federal courts have held that reduced pricing which is predatory in the sense that it is aimed at the destruction of a particular competitor, or which amounts to an unfair monopoly attempt, would also be outlawed.

The discussion of the Court below with respect to the protection of an inherent low cost advantage of one mode of transportation from the pricing reductions of another is *obiter dictum* since the protection of an inherent cost advantage was not the basis of the Commission's finding of unlawfulness.

The railroads most respectfully suggest that if this Court were to approve the *obiter dictum* of the Court below, that under Section 15a(3), the Commission may find unlawful reduced competitive pricing of one mode to protect an inherent low cost advantage of another mode, it should not attempt to advise the Commission how an inherent low cost advantage should be determined or, if properly found to exist, the details of how it should be protected. Rather, it is suggested that these are matters which should be left to the Commission's expertise in the first instance for determination upon adequate records. Should the Commission make such determinations—which it has not done as yet and certainly has not done in the Sea-Land litigation—court review might be appropriate.

V
ARGUMENT

A. Review by the Courts Is Limited to the Basis Which the Commission Relied Upon in Reaching Its Determination.

The Court below, in setting aside the Commission's order, stated that its holding was rested upon the basis which the Commission said it had used in finding the reduced TOFC rates unlawful (R. 258). Whether there might have existed other bases which would have lawfully empowered the Commission to take the action it did, the Court below indicated was not before it for consideration, citing *Securities Comm'n v. Chenery Corp.*, 318 U. S. 80, 87. This proposition has recently been reaffirmed by this Court with respect to orders of the Interstate Commerce Commission. *Burlington Truck Lines, Inc. v. United States*, — U. S. —, 83 S. Ct. 239, 246.[8]

Thus, the question before this Court is whether the Commission's stated basis for its action was lawful and not whether upon some other, but unannounced basis, either supported by the record or not, its order could be sustained. We most respectfully invite this Court's attention to this at the outset because it is believed that it disposes of arguments and contentions which were not before the Court below for decision, and are not before this Court for review. Furthermore, we suggest that recognition of the *Chenery* doctrine here may avoid consideration of controversial economic questions of a type which, in the first instance, should be fully considered by the Commission within a

8. In *Burlington*, the Court approved the Chenery doctrine as set forth in *Securities Comm'n v. Chenery*, 332 U. S. 194, 196 [i.e., the second *Chenery* case]. So far as the instant proposition is concerned, the second *Chenery* case affirmed the first. *Securities Comm'n v. Chenery*, 318 U. S. 80, 87.

frame of actual facts rather than as abstract exercises. After such initial Commission consideration, court review would, of course, be appropriate to ascertain whether or not the agency had remained within its statutory limitations. Particularly, we suggest that this is true within respect to the ascertainment of the existence of inherent low cost advantages and the details of how such advantages are to be protected, for these seemingly are matters peculiarly within the expertise of the Commission.

B. The Basis Used by the Commission, Namely That the Reduced TOFC Rates Under the Circumstances Present Constituted Destructive Competition, Was Inconsistent With the Provisions of Section 15a(3) and, Therefore, the Court Below Correctly Set Aside the Commission's Order as Unlawful.

Completely disregarding the preservation of an inherent advantage of low cost (R. 37), saying it could not determine which mode possessed such advantage, the Commission found unlawful the reduced compensatory TOFC pricing primarily upon the basis that it constituted "destructive competition" (R. 34). While Section 15a(3) does not say "destructive competition" is unlawful, the National Transportation Policy does require the Commission to administer the Interstate Commerce Act ". . . to encourage the establishment and maintenance of reasonable charges . . . without . . . unfair or destructive competitive practices". Presumably, the Commission in referring to destructive competition was using the term as being synonymous with unfair or destructive competitive practices.

The Commission's conclusion was that the reduced TOFC rates were unlawful as destructive competition because, if extended, they would threaten the ability of the coastwise water carriers to operate efficient and economical services, apparently either by diverting traffic from them,

or by compelling them to reduce their rates to remain competitively attractive (R. 38, 41). In broad and general terms, the Commission then said the coastwise water carriers are important to the commerce of the nation and its defense and that, because of this, their traffic should be protected from otherwise lawful rail pricing reductions (R. 39-41). But at no point did the Commission specifically find how the commerce of the nation or its defense would be imperiled, even assuming the worst that all four of Sea-Land's vessels, and all six of Seatrain's vessels (R. 10), would be forced to withdraw from the trades.

The Commission's reliance upon the preservation of the national defense to deviate from the specified requirements of the Interstate Commerce Act, the Court below concluded, was improper for two reasons: first, because the preservation of the national defense is not a mandate of the National Transportation Policy as to how the Act is to be administered, but rather its "hoped-for 'end' ", assuming the Act is soundly administered in conformity with the specified mandates of the Policy (R. 256); and, second, because the facts which the Commission said it relied upon would not support its conclusion that the national defense would be jeopardized if Sea-Land and Seatrain were to withdraw from the coastwise trades (R. 257).

The Government, in its brief, disagrees with the first reason given by the Court below saying there may be extraordinary circumstances where preservation of the national defense would warrant the Commission's ignoring Section 15a(3)'s prohibition against protective pricing differentials.[9] But, in substance, the Government agrees with the second reason of the Court below and goes further and argues that the Commission's report is completely lacking in the type of findings required to utilize the preservation of the national defense as a basis for "protective differentials".[10]

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9. See brief of United States at 44, 46, 47.

10. Id. at 45, 48, 49.

In a later section of this brief (*infra* 23 to 29) the question of whether the Commission has power to prescribe protective pricing differentials to preserve carriers for national defense purposes, either upon the statements it made with respect to the coastwise water carriers in the instant proceeding, or upon appropriate detailed findings such as the Government suggests would be required to authorize the Commission to deviate from the specific anti-protective declaration in Section 15a(3), will be discussed more fully. At this point the question being considered is, aside from the national defense aspect, was the basis used by the Commission within its powers in the light of the new rule of rate-making?

Essentially, the basis amounts to this. If a carrier of one mode reduces its rates and, by so doing, may divert traffic from carriers of another mode to the extent that their continued existence is threatened, the rate reductions may be found unlawful solely because of the severity of their competitive impact. This is so even though the adversely affected carriers are not found to be possessed of inherent cost advantages, and the rate reductions, aside from the fact that they will attract traffic in large amounts, would be lawful.

The Court below held that the Commission, in using this basis, violated Section 15a(3) since ". . . contrary to the specific prohibition of the 1958 amendment, [it] is plainly holding up railroad rates 'to protect the traffic' of another mode", and pointed out that due consideration of the National Transportation Policy would not in this instance justify deviation from the specific prohibition of the Section (R. 247). Looking to the National Transportation Policy, the Court concluded that while it requires the Commsision to recognize and preserve "inherent advantages", meaning the ability to offer services at lower costs, the Commission did not ". . . rest its holding on the 'inherent advantages' factor of the . . . [Policy]" (R. 249). Rather, the Court said the Commission relied upon the Pol-

icy's directive against unfair, destructive, competitive practices to justify its decision. This under the circumstances present ". . . was an erroneous interpretation of the Act as amended" the Court held, (R. 249) and referred primarily to the legislative history and purposes of Section 15a(3) to support its holding (R. 250, 251).

Before considering the legislative history—a consideration that will be greatly shortened since the Government and the Commission, in their briefs, have reviewed the history so fully—it would seem appropriate to invite this Court's attention to the fact that two other three judge federal courts, without dissent, have held that the Commission, under the new rule of rate-making, may not, in the interest of preserving useful carrier services, find unlawful reduced pricing of a different competitive mode which is compensatory and which will not destroy or impair an established low cost advantage.

In *Missouri Pacific Railroad Company v. United States*, 203 F. Supp. 629 (E. D. Mo. 1962), a three judge court reversed an order of the Commission which had held unlawful reduced compensatory rail rates on the ground that they had diverted large volumes of traffic from motor carriers and thus endangered their ability to continue operations.[11] As was the case in the *Sea-Land* proceeding, the Commission, in reaching its conclusion had relied upon the National Transportation Policy and had not attempted to justify its action on the basis of preserving an established low cost advantage. The Court, holding the Commission's order unlawful, said:

> "We have concluded that the decision based on the stated findings is erroneous and reflects a misinterpretation of the law as amended by Section 15a(3)."

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11. 203 F. Supp. at 632.

"The resulting amendment was explicit in its prohibition of the 'protected' practices which the Congress attributed to the ICC during the 50's."

. . . .

"Legislative history so clearly affirms the patent meaning of these words that it does not merit quotation."

"Yet, despite this amendment and its history, the Commission would drain its strength and negate its effect entirely by grasping the qualifications of 'giving due consideration to the objectives of the national transportation policy', and emphasizing it to the detriment of the directive it merely qualifies."[12]

Another three judge court reached the same conclusion where the Commission found unlawful reduced rates on cigars which it found would either divert substantial traffic from the motor carriers or force them to reduce their rates to remain competitive. *St. Louis-San Francisco Railway Co. v. United States*, 207 F. Supp. 293, 297 (E. D. Mo. 1962).[13]

12. 203 F. Supp. at 633, 634.

13. In *Pennsylvania Railroad Company v. United States*, 202 F. Supp. 584 (E. D. Pa. 1962), a three judge court held that under Section 15a(3) the Commission could not peg compensatory rail rates at artificially high levels to protect the traffic of barge lines unless the water carriers had established an inherent advantage. It does not appear that the Commission attempted to justify its action under the National Transportation Policy, but rather was endeavoring to equalize the overall charges to the shippers using the different modes. To this extent, the case differs somewhat from the instant situation, but it does sustain the proposition which the Court below, in the *Sea-Land* case, propounded. *Atlantic Coast Line Railroad v. United States*, 209 F. Supp. 157 (S. D. Fla. 1962), in which a three judge court sustained an order of the Commission which had found unlawful reduced rail rates on phosphate rock on the ground that they would be harmful to the railroads, is in no way contrary to the holding of the Court below for it is based upon Section 15a(2) rather than Section 15a(3) of the Interstate Commerce Act. Id. at 159, n. 6 at 159.

These cases,[14] while resting to a considerable degree upon the holding and reasoning of the Court below, are of significance because the courts in each, upon review of the legislative history and purposes of Section 15a(3), were convinced, as was the Court below, that Congress, by enactment of the Section, intended not only to increase and stimulate competition between the different modes, but also to make it clear once and for all that the protective policy of the Commission of attempting to divide the available traffic among the different modes by pricing differentials would be outlawed. Stated differently, the several courts which have studied the meaning of the new rule of ratemaking have been firmly convinced that the requirement that the Commission give due consideration to the "objectives of the National Transportation Policy" does not empower it under that Policy's directive to eliminate "unfair or destructive competitive practices" to hold up the rates of one mode to a level which will prevent the diversion of substantial traffic from another mode, even though such loss of traffic might threaten the continued existence of the adversely affected carrier. Logic compels this conclusion, since any other view necessarily results in the specific anti-protective requirement of Section 15a(3), which was enacted for the express purpose of outlawing umbrella ratemaking, being wholly ineffective. The legislative history also supports this conclusion.

1. *The Legislative History of Section 15a(3) and the Purposes of Congress in Enacting It Fully Sustain the Holding of the Court Below.*

With the exception of the Government, one of the principal contentions of the appellants and the *amici* supporting

14. The *Missouri Pacific* case is on appeal to this Court but neither the Commission nor the United States is an appellant. The *St. Louis-San Francisco Railway Co.* case is not presently on appeal to this Court, all parties having entered into a stipulation to dismiss the appeal.

them is that a review of the legislative history shows that Congress, in enacting the new rule of rate-making, did not intend to change the rate supervision powers of the Commission. The Commission, for example, in its brief says:

> "As we interpret the legislative history, it demonstrates that Section 15a(3) brought about no fundamental change in the law. Rather, it would appear that the section's intended function was to insure that the Commission consistently apply the Congressional Policy which existed prior to the section's enactment . . ."[15].

But the Court below, found such position unrealistic and inconsistent with the stated objectives of the Congressional Committees which endorsed the legislation. As the Court said:

> "Having in mind that by the 1958 amendment Congress for the first time articulated an express, though qualified, prohibition against holding up the rates of one mode to protect another . . . we are unable to accept the contention . . . that . . . [Section 15a(3)] brought about no fundamental change in the law." (R. 251)

Summarizing its review of the legislative history, the Government, in agreeing with the Court, now says:

> "The foregoing account makes clear, we think, that it was not the intent of Congress to give the Commission with one hand what it had taken away with an-

15. Brief of Commission at 33, 34. See also brief of Seatrain at 13-15. The briefs of Sea-Land, American Trucking Associations, and the Waterways Freight Bureau all suggest that the regulatory principles followed prior to the enactment of Section 15a(3) are preserved intact by the reference in the Section to the National Transportation Policy.

other—namely, the power to act as a 'giant handicapper' establishing whatever differentials might be necessary to equalize the race, or at least assure that no runner would drop out." [16]

Without attempting to detail the legislative history again, certain features of it stand out. Section 15a(3) was not enacted upon the spur of the moment, but rather was the product of a great deal of study, controversy and reconciliation of different viewpoints within the transportation industry. Particularly among the railroads, there was great dissatisfaction with the manner in which the Commission was dealing with intermode competitive pricing adjustments. The Congressional Committees referred to the Commission's treatment of those adjustments as "not consistent" [17] and the Court below summarized the Commission's action in this important field as vacillating (R. 250). While the Commission had indicated in the *New Automobiles* case that its policy was not to hold up the rates of one mode to preserve the pricing structure of another,[18] this policy was regularly abandoned and a contrary policy, of prescribing rate differentials, or minimum rates, to divide the traffic according to its notion of what constituted fair shares, was pursued.[19] The Congressional Committees were of the opinion that the rule of rate-making should be amended so that the inconsistent rate supervision ap-

16. Brief of United States at 38.

17. Report No. 1922 of House Committee on Interstate and Foreign Commerce on H. R. 12832, 85th Cong. 2d Sess. at 14 (1958); Report No. 1647 of Senate Committee on Interstate and Foreign Commerce, 85th Cong. 2d Sess. at 3 (1958).

18. See *New Automobiles in Interstate Commerce*, 259 I. C. C. 475, 538 (1945).

19. See e.g., *Petroleum Products In Ill. Territory*, 280 I. C. C. 681, 691 (1951); *Coffee From California To Utah and Idaho*, 289 I. C. C. 93, 96 (1953); *Aluminum Articles From Texas To Ill. and Iowa*, 293 I. C. C. 467, 472 (1954); *Tin Plate From Fairfield, Ala., To New Orleans*, 294 I. C. C. 397, 403 (1955).

proach of the Commission would be brought to an end.[20] The policy which the Congress ordered the Commission to abandon was the protective one whereby rate differentials were prescribed in an attempt to divide the available traffic among competing modes. In place of this, the Commission was ordered to adhere to a policy which will permit a freer play of the forces of the market place. To accomplish this, the specific prohibition against rate differentials was incorporated in Section 15a(3). Certainly this changed the law for it forcefully told the Commission to discard a much used policy which it had regarded as being well within its powers.[21]

While it seems clear from the legislative history that the primary objective of the Congress was to eliminate rate differentials aimed at protecting the traffic of competitors of a different mode from the impact of reduced pricing, it is equally clear that the Commission's supervision over intermode competitive pricing was not completely abolished. The inclusion, in Section 15a(3), of the requirement that consideration be given to the National Transportation Policy insured the retention of some rate supervision by the Commission.

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20. House Committee Report, *op. cit., supra*, note 17 at 15; Senate Committee Report, *op. cit., supra*, note 17 at 3.

21. While within the Commission the opinion may exist that Section 15a(3) did not change the law, this viewpoint apparently is not shared by Mr. Harris, the Chairman of the House Committee on Interstate and Foreign Commerce which was largely responsible for the present language of the Section.

Criticizing a public statement by one of the Commissioners that the Section merely ". . . restates what is already considered to be the Commission's responsibility under the rate making provision of the Interstate Commerce Act", Mr. Harris made it abundantly plain that he thought differently, and that ". . . Congress . . . worked long and hard and diligently and came up with a change in the law, . . ." See Investigation of Regulatory Commissions and Agencies, Hearings Before a Subcommittee of House Committee on Interstate and Foreign Commerce, 85th Cong. 2d Sess., and 86th Cong. 1st Sess., Part 14 at 5429-5433 (1958, 1959).

The mandates of that Policy reasonably related to rate regulation require the Commission to do three things: (a) to recognize and preserve inherent advantages; (b) to promote economical service and foster sound economic conditions; and, (c) to encourage the establishment of reasonable charges without unjust discrimination, undue preference of advantages, or unfair or destructive competitive practices. Leaving aside the preservation of inherent advantages for the moment because the legislative history indicates that the carriers should be free to utilize their inherent advantages,[22] the question here presented is: Does the legislative history support the appellants' argument to the effect that, the National Transportation Policy's proscription of unfair or destructive competitive practices nullifies Section 15a(3)'s specific prohibition against protective differentials where pricing reductions making possible substantial diversion of traffic threaten the existence of a competitor of a different mode? The Committee Reports do not precisely answer this question as such, but the stated objective in both reports, to encourage competition between the different modes would obviously be thwarted if the prohibition against protective pricing differentials only applies where the competition is soft and the diversion of traffic likely to be inconsequential.[23]

The debates in the Congress, however, provide the answer to this very question. Senator Lausche referred to as ". . . one of the knowledgeable members of the committee in the field of transportation"[24] made it plain that the Section was aimed at the elimination of the type of thing he described in these terms:

> "It may astound some of my colleagues to hear me state that the railroads are not allowed to charge a low

22. Senate Committee Report, *op. cit., supra*, note 17 at 3; House Committee Report, *op. cit., supra*, note 17 at 14.

23. Senate Committee Report, *op. cit., supra*, note 17, at 3; House Committee Report, *op. cit., supra*, note 17 at 15.

24. 104 Cong. Rec. 10841.

rate, even though the low rate produces a profit for them and is non-discriminatory with respect to shippers, if the lowness of the rate has an adverse impact upon the truckers, the barge carriers, or the air lines.

. . . .

"The railroads are required to hold an umbrella over the heads of the truckers and barge lines. They are told, when they charge a rate which is low, even though it makes a profit for them, that such rate is not allowable if it will adversely affect the ability of the truckers or the barge lines to remain in business."[25]

Representative Harris, who was Chairman of the House Committee on Interstate and Foreign Commerce, and who took a leading part in drafting Section 15a(3) made a similar statement on the House floor in answering a question as to whether reference to the National Transportation Policy was "strong enough to prevent one carrier from taking advantage of another carrier". He replied:

"That is true, but I will tell you another thing though, that if a carrier can provide a rate, that is fully compensatory, to the shipping public, the Commission cannot as it is contended in many instances they are doing, require that carrier to hold that rate up to a higher level just because it is necessary to keep another mode of transportation in business."[26]

Thus, in addition to there being nothing in the legislative history to support a view that the prohibition against protective pricing differentials is to be nullified if the re-

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25. Id. at 10822.

26. Id. at 12531. Representative Allen expressed the same thoughts for he said:

"No longer will railroad rates, for example, be held by the ICC at a high level just to keep traffic from being diverted from the highways and inland waterways." (Id. at 12524)

duced pricing will cause such a substantial diversion of traffic as to threaten the continued existence of a competitor, the debates on the floor of both the Senate and the House fully sustain the opposite conclusion, namely, that the application or relaxation of the prohibition is not dependent upon the severity of the adverse effects of the rate reductions.

Several of the appellants and those supporting them, argue that it was not the intention of Congress in enacting Section 15a(3) to modify or change the National Transportation Policy,[27] and that since the Commission had utilized that Policy in the past as a basis for finding that reduced rates, which diverted substantial traffic from competitors and thereby threatened their ability to continue operations, were unlawful, this power survives despite the specific prohibition in the Section against protective differentials. The short answer to this is that the Congressional Committees thought such actions by the Commission, prior to 1958, were inconsistent with the exactly contrary policy announced by it in the *New Automobiles* case, *supra*. So that the Commission would be informed as to which of the two contrary policies should be followed, the Congress enacted the specific prohibition against protective differentials and, in effect, said that insofar as it was concerned, and regardless of what the Commission had earlier decided it had power to do, or even what the courts indicated the Commission's powers might have been, the National Transportation Policy had been improperly used to hold up prices to protect the traffic of adversely affected competitors. Congress further indicated that it wanted to make certain that the Commission understood that the National Transportation Policy compelled the Commission to follow the doctrine of the *New Automobiles* case. This view, it should be noted, is completely logical and makes good sense since it removes any seeming conflict between the specific prohibition of Sec-

27. See e.g., briefs of: Commission at 14, 15; Seatrain at 14; and, Waterways Freight Bureau at 18.

tion 15a(3) and the terms of the National Transportation Policy.[28]

C. The National Transportation Policy Does Not Empower the Commission in the Interest of Preserving Carriers Deemed by It to Be Important to the National Defense to Deviate From the Basic Scheme of Economic Regulation Provided by the Interstate Commerce Act.

The Court below held that the Commission could not, by reliance upon the preservation of the national defense, make lawful rate supervisory functions which are placed beyond its powers by the specific provisions of the Interstate Commerce Act. As the Court stated (R. 256):

> "True, the hoped-for 'end' of the National Transportation Policy is a system 'adequate to meet the needs * * * of the national defense'. But the national defense is not stated as an operative policy or means: it is mentioned only as the hoped-for 'end' of the operative policy-factors previously enumerated. It is not stated and, we think not intended, as a blanket ground of power to the Commission effective to nullify the expressed prohibition of rate differentials."

The Government, in its brief, says that this position goes too far and that there may be circumstances where the Commission, to preserve a carrier vital to the national defense, could go beyond what otherwise would be the

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28. There is a tendency on the part of the appellants to define the meaning of "unfair or destructive competitive practices" as used in the National Transportation Policy in its own terms or by generic words. For example, the brief of Sea-Land, at 11, talks of the need to protect against "predatory rate practices" and at 15 says the prevention of destructive competition must mean that "competition which destroys be proscribed in the future". The brief of American Trucking Associations, at 22, says it is necessary "where competition exists to prevent destructive competitive practices". The difficulty with this approach is that it does not provide constructive assistance in defining or describing just what types of activities are embraced within the objectionable conduct.

borders of its statutory powers.[29] The situation would have to be an extraordinary one—one in which the carrier sought to be protected by the pricing differentials is fulfilling a role essential to the defense of the nation which could not be adequately fulfilled by other carriers.[30] But the Government argues that the Commission in this instance made no findings which would satisfy such a test.[31]

The Commission, the Court below says, had "scant basis of fact" to support its order based on national defense considerations (R. 256). Actually, all the Commission referred to were two reports, one published in 1955 by the Maritime Administration and the other in 1950 by a Senate Committee which concluded in the most general terms that the availability of domestic tonnage is of importance to the national defense (R. 38-39). These broadly stated conclusions do not demonstrate what is the extent of the contribution of Seatrain's and Sea-Land's relatively small number of vessels to the overall defense program;[32] nor do they

29. Brief of United States at 44, 46, 48.

30. Id. at 46-48.

31. Id. at 49.

32. The Commission apparently thought that Sea-Land and Seatrain were important to the national defense because they were the two remaining, out of some nineteen, companies which were engaged in the coastwise trades prior to World War II (R. 38). To place these statistics in the right light, the Commission might have indicated, as the Examiner did, that this was caused by "substantial increases in operating costs" (R. 176). Further, to have given a full picture, the Commission might have indicated that domestic coastwise shipping has not declined. In 1939, the total domestic tons handled between the North Atlantic, South Atlantic and Gulf ports totaled 108 million tons. Economic Review of Coastwise and Intercoastal Transportation, U. S. Maritime Commission at Appendix 1-V (1941). Every year since 1952 this tonnage has increased, and by 1960 had reached 134 million tons. Domestic Oceanborne and Great Lakes Commerce of the United States, U. S. Dept. of Commerce, Maritime Administration at 1, 2, 87, 88 [tonnages compiled from various tables] (1962). Furthermore, while the number of vessels in the trades has decreased, their capacity has steadily grown. Thus, in 1940, the total deadweight tonnage of vessels used in the domestic trades totaled 4,172 thousands of tons, and by 1960 this had grown to 4,883

explain why the national defense would be better served by retaining the availability of those carriers' ships at the expense of prohibiting the railroads—a vital part of the national defense system[33]—from effectively competing for traffic at reduced compensatory rates and thereby affording the shipping public economical freight charges. Commenting upon the absence of specific findings in the report of the majority of the Commission, Commissioner Freas, in his dissent, said:

> "There is no evidence here that either the commerce of the United States or the national defense would be hampered unless the water carriers, though not shown to have the inherent advantages in many instances, are given an artificial rate advantage. A reiteration of some of the language contained in the national transportation policy is in and of itself no substitute for essential supporting evidence."
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> . . .

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thousands of tons. Statistical Abstract of the United States, U. S. Dept. of Commerce, Bureau of Census at 601 (1962). The coastwise trades, therefore, have not declined, but have grown. The consist of the traffic handled in these trades has changed, however, so that today most of the freight being moved in this segment of the ocean trade consists of bulk commodities which move completely free of regulation by the Commission. The only decline in coastwise tonnage is traffic which is peculiarly susceptible to motor carrier competition.

By contrast the Commission might also have pointed out that the freight traffic of the railroads has steadily declined since 1950. 76th Annual Report of the Interstate Commerce Commission at 215 (1962).

33. In the introduction to its report proposing the legislative changes which were later incorporated in the Transportation Act of 1958, of which Section 15a(3) was a part, the Senate Subcommittee said:

> "During times of crisis for our Nation the railroads have met the challenge. During World War II the railroads transported more than 90 percent of all military freight traffic and 97 percent of organized military passenger movements. Thus the railroads were, and are, a vital part of this Nation's security." (Senate Committee Report, *op. cit., supra*, note 17 at 7)

> "The decision of the majority may well be taken to stand for the proposition that water carriers are ordinarily entitled to rate differentials regardless of the circumstances of the specific case." (R. 45)

Because of the absence of adequate findings to support the use of the national defense as a basis for disregarding the Section 15a(3) prohibition against protective pricing differentials—whether or not such basis might be lawfully used when buttressed by sufficient findings—the report of the Commission, to the extent that is based upon the national defense, must be found wanting as the Government contends and the Court below held.[34]

But it is the position of the railroads that the basic national defense holding of the Court below is sound and that, therefore, the lack, or inadequacy, of the findings, while a sufficient basis for setting aside the Commission's order, did not have to be relied upon.

The Interstate Commerce Act, taken in its entirety, provides a pattern for regulating a large segment of the transportation industry. While the regulation provided by this pattern is complex, intricate, and detailed, the Congress in the National Transportation Policy has indicated that if such regulation is pursued fairly with due regard for the basic mandates set forth in the policy itself, the end product will be a national transportation system adequate for the commerce and the defense of the United States. Where, however, the Congress has become convinced the scheme of regulation, either because of inadequacies of the statute or in the administration of the law by the Commis-

34. See *Cantlay & Tanzola v. United States*, 115 F. Supp. 72, 80 (S. D. Cal. 1953); *Pacific Inland Tariff Bureau v. United States*, 129 F. Supp. 472, 484 (D. Ore. 1955). In *Pacific Inland Tariff Bureau*, the court found the reduced rail rates to be non-compensatory and hence unlawful regardless of the national defense considerations. Id. at 485. It should be noted that both cases arose before the enactment of Section 15a(3), and that, therefore, to the extent that they might indicate the national defense is a basis for protective pricing differentials, they are entitled to little, or no, weight.

sion, is not accomplishing the objective of providing an adequate national transportation system, the remedy has been either a major change in the entire scheme or an overhauling of particular sections of the Act. Typical of the major revisions were the Motor Carrier Act of 1935,[35] which brought a fairly large segment of the for-hire motor carrier industry under regulation, and the Transportation Act of 1940, which placed some of the water carriers under the supervision of the Commission.[36] Both of these broad changes were made to strengthen and improve the national transportation system so that it would be better able to serve the public interest.[37]

The overhaul of particular sections and the inclusion of new sections to improve the national transportation system has frequently been resorted to, and no better example is the Transportation Act of 1958, of which Section 15a(3) is a part. This statute was concerned with specific regulatory inadequacies rather than broad gaps in the pattern. Speaking of the objectives of this reform legislation, the House Committee said:

> "The purpose of this bill is to amend the Interstate Commerce Act in order to strengthen and improve our Nation's common carrier surface transportation system so that it may better fulfill its role in meeting the transportation needs of the Nation's expanding economy and the requirements of national defense."

and went on to say:

> "This purpose is accomplished through five amendments:
>
> . . . . .

35. 49 Stat. 543. The Transportation Act of 1940, 54 Stat. 919, included the Motor Carrier Act of 1935 as Part II of the Interstate Commerce Act. 49 U. S. C. § 301.

36. 54 Stat. 929.

37. See Report No. 482 of Senate Committee on Interstate Commerce, 74th Cong. 1st Sess. at 3 (1935); Report No. 433 of Senate Committee on Interstate Commerce, 76th Cong. 1st Sess. at 2, 3, 4 (1939).

> "Section 5 (amending sec. 15a of the act) adds a new paragraph to guide the Commission in competitive rate cases."[38]

It is clear, therefore, that the Congress, when it enacted Section 15a(3), was convinced that the national defense would be better served if the Commission were forbidden to pursue its protective pricing policies aimed at dividing traffic among the competitors of different modes and were ordered to follow the contrary policy of the *New Automobiles* case. Congress felt that the national transportation system would be improved and strengthened to the ultimate benefit of the nation's commerce and defense by ordering the Commission to allow carrier pricing to be determined in the marketplace rather than by artificial administrative restraints.

If the Commission has the right to disregard the standards provided by Section 15a(3) whenever it becomes of a mind that the national defense requires it to do so, in effect it is possessed of power to veto the Congress' scheme of regulation and to advance its ideas of how the national defense should be provided for in place of those of the Congress. This, we contend, is not the role which the Congress has intended for the Commission.

If there is a specific transportation service vital to the defense effort being furnished by a particular carrier, which cannot survive with prices established in the competitive marketplace and must, therefore, have artificially high charges to continue to provide the essential defense transportation,—and this vital service cannot be efficiently furnished by other carriers—the remedy is not to break down the pattern of regulation as it applies throughout the pricing field. Rather, those charged with the responsibility for the nation's defense should pay for such essential transportation service at levels high enough to keep the company providing it alive. Whether this would amount to subsidy would seem immaterial in such circumstances.

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38. House Committee Report, *op. cit. supra*, n. 17 at 2.

D. The Holding of the Court Below Will Not Support the Proposition That the Commission's Only Basis for Finding Unlawful Reduced Intermode Competitive Pricing Is to Protect an Inherent Low Cost Advantage.

With the exception of the United States, the thrust of the arguments of the appellants is to the effect that the Court below has held that the only basis upon which the Commission can find unreasonable pricing reductions of one mode, which will affect carriers of another mode, is where the protection of an inherent low cost advantage is involved.[39] This was not the holding of the Court. What the Court held was that the basis used by the Commission—namely, that it could find unreasonable, hence unlawful, reduced compensatory rates of one mode which, by diverting substantial traffic, would threaten the ability of carriers of another mode to continue operations—was not available to it because of the prohibition in Section 15a(3). That was the limit of the Court's holding because under the *Chenery* doctrine[40] the legality of the basis used by the Commission was all that was before the Court for decision.

The language of the Court below confirms this (R. 249):

> "Apparently the Commission thought that any rate competition which threatens the continued existence of a competitor it had power to prevent as a 'destructive competitive practice' irrespective of whether the challenged rates were compensatory to the proponent thereof or whether the mode of the contesting competitor was a lower-cost mode than that of the proponent. . . . This, we hold, was an erroneous interpretation of the Act, as amended."

39. Briefs of: Commission at 15; Sea-Land at 15; Seatrain at 13; Waterways Freight Bureau at 23; and, American Trucking Associations at 21.

40. *Securities Comm'n v. Chenery Corp.*, 318 U. S. 80, 87, 88; 332 U. S. 194, 196.

As the argument of the United States is understood, it is of the same mind as the railroads with respect to the actual holding of the Court below. At page 12 of its brief the Government says:

> "We agree with the district court that the Commission's order, to the extent it relied upon destructive competitive practices, cannot stand."

The Commission, however, in addition to finding the reduced TOFC rates unlawful, also indicated that for such rates to be lawful they would have to be maintained at levels 6 percent higher than the corresponding Sea-Land rates, and that the rail boxcar rates should provide differentials favoring Sea-Land of "somewhat less than the 6 percent" (R. 41). The guideline respecting the rates for boxcar service was included even though such rates were not at issue, and even though the record showed that the railroads' boxcar costs were lower than Sea-Land's (R. 17).

While the Court held that the basis used in condemning the TOFC rates was unlawful, it undoubtedly thought there was value in going beyond the holding and suggesting to the Commission, by way of an extended *obiter dictum*, the conditions it believed would have to be present to support the prescription of protective differentials. Based upon its study and analysis of the legislative history, the Court was of the opinion that for the Commission to have power to prescribe protective differentials, factors would have to be present (R. 251):

> ". . . other than the normal incidents of fair competition . . . , such as a practice which would destroy a competing mode of transportation by setting rates so low as to be hurtful to the proponent as well as his competitor, or so low as to deprive the competitor of the 'inherent advantage' of being the low-cost carrier."

This language supports the view that the Court below was not saying that the only circumstance which would per-

mit the Commission to find unlawful reduced competitive rates is the protection of an inherent low cost advantage. If the rate reduction includes practices which are "other than the normal incidents of fair competition" it may be found unlawful. By use of the words "such as", the Court indicates that it is giving two examples of unlawful reduced rates. The first example embraced in the mandate against "unfair or destructive practices" includes non-compensatory rates. The Government in its brief expresses the same thought, characterizing non-compensatory rates as one example of predatory rates.[41] A review of the rate cases involving intermode competitive situations, since the enactment of Section 15a(3), will show that where the Commission has found reduced rates to be unlawful the basis most used was that they would be non-compensatory.[42]

But in the absence of unfair or destructive competitive practices which the Court describes as pricing including "practices other than the normal incidents of fair competition",[43] the Court below concluded that the only remaining

41. Brief of United States at 13. Another type of predatory rate condemned by the National Transportation Policy directive against unfair or destructive competitive practice is one designed for the specific purpose of destroying a competitor. See *Lackenbach Steamship Co. v. United States*, 179 F. Supp. 605, 612 (D. Del. 1959), aff. 364 U. S. 280.

42. See Harbeson, The Regulation of Interagency Rate Competition Under The Transportation Act of 1958, 30 I. C. C. Prac. J. 287, 294 (1962).

43. In *New York Central Railroad Co. v. United States*, 194 F. Supp. 947 (S. D. N. Y. 1961), aff. 368 U. S. 349, the court said that in determining what types of pricing activities are included as "unfair or destructive competitive practices", the Commission and the courts can look to the Antitrust Statutes, 194 F. Supp. 951. The Antitrust Statutes would not outlaw pricing reductions made in good faith to meet new competition even though the impact would be most severe upon the new competitor. See *Ben Hur Coal Co. v. Wells*, 242 F. 2d 481, 486 (10th Cir. 1957), cert. denied 354 U. S. 910. *Moore v. Mead's Fine Bread Co.*, 348 U. S. 115, cited by Waterways Freight Bureau in its brief at 29, is not to the contray but supports the view of the railroads [See note 41, *supra*] because there this Court found there was "ample" proof that the pricing reduction was for the purpose of destroying a competitor (348 U. S. 118). *F. T. C. v.*

basis for condemning pricing reductions is the preservation of inherent low cost advantages. The Government agrees with this view.[44]

Since related to rates, the only mandates of the National Transportation Policy, other than the prevention of unfair or destructive competitive practices, that are germane, are those requiring the protection of inherent advantages[45] and the encouragement of sound economic conditions in transportation, the view of the Court below is consistent with the structure of the statute. The Government seemingly agrees. And, the legislative history, as detailed in the briefs of the Government and the Commission provides support for such position.

E. If This Court Deems It Appropriate to Approve the Obiter Dictum of the Court Below to the Effect That the Commission Has Power to Prescribe Differentials to Protect an Established Inherent Low Cost Advantage, the Commission in the First Instance, Subject to Judicial Review, Should Be Given the Responsibility of Developing the Rules for Determining the Existence of Inherent Low Cost Advantage and the Means by Which Such Advantage Is to Be Protected.

We believe that, aside from their basic disagreements with the holding of the Court below, the Commission and some of the other appellants are concerned that the Court's *obiter dictum* may remove from the Commission a function which it would seem is, at least in the first instance, rightfully its. Assuming the Court below is correct that the Commission may protect an inherent low cost advantage, how

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Anheuser-Busch, Inc., 363 U. S. 536, likewise has no relevance because the contention that ". . . price reductions had been made in good faith to meet the equally low price of a competitor" had been rejected. Id. at 541.

44. Brief of United States at 13.

45. The advantage of lower costs is ". . . precisely the sort of 'inherent advantage' that the congressional policy requires the Commission to recognize", *Schaffer Transportation Co. v. United States*, 355 U. S. 83, 91.

the existence of such advantage is to be determined, we most respectfully suggest, is a function of the Commission. It is to be noted in this connection that in the instant matter the Commission has said that on the record before it, it could not determine which of the competing modes possessed the inherent low cost advantage and, therefore, this Court does not have before it the methods or the routes by which the Commission could make such a determination in future pricing controversies.

Throughout the briefs of the appellants, and broadly sprinkled through the opinion of the Court below, there are references to such concepts as "costs", "out-of-pocket costs", "fully distributed costs", "full costs", "compensatory rates", "fully compensatory rates", "comparative costs", "overall low-cost mode", etc. These, to say the least, are terms which have complex, difficult and varying meanings depending on the context or framework of facts in which they are used.[46] Furthermore, there is considerable controversy—assuming the terms can be given reasonably acceptable meanings—as to which type of "costs" should be used in determining which possesses the inherent low cost advantage as between different modes of transportation.[47]

We respectfully suggest that the Commission's expertise in dealing with costs should be looked to in resolving

46 The complexities and difficulties in the use of the various cost terminology are evident from the discussion of the Court below (R. 248, 253, 254). The Appendix to the Court's opinion emphasizes this (R. 260-262). An examination of the Commission's Bureau of Accounts, Statement No. 4-54, entitled "Explanation of Rail Cost Finding Procedures and Principles Relating to the Use of Costs" (1954), a pamphlet of 250 pages, would provide further confirmation.

47. Typical of such controversy is the difference of opinion as to whether "fully distributed costs" should be used in determining the presence of a low cost advantage. Waterways Freight Bureau is an advocate of the use of "fully distributed costs". See its brief at 32-40. Distinguished economists, however, are of a different mind and advocate the use of "relevant incremental costs". See Baumol and Others, The Rule of Cost in the Minimum Pricing of Railroad Services. 35 U. of Chicago, J. of Bus. 1, 5, 9, 10 (1962).

such problems upon a case-to-case basis and upon records which it deems adequate. After such primary consideration by the Commission, court review to ascertain whether the Commission's conclusions are consistent with the law would, of course, be appropriate. To attempt to solve in a vacuum, or as an abstract proposition, the problem of how an inherent low cost advantage should be determined might create problems of greater severity than that being solved. Further, we suggest that the same thing applies with respect to the means by which, or the extent to which, an inherent low cost advantage should be protected.[48]

VI
CONCLUSIONS AND RELIEF REQUESTED

For the reasons stated more fully above, it is most respectfully submitted that this Court should affirm the decision of the Court below which set aside the report and order of the Commission in *Commodities—Pan-Atlantic Steamship Corporation*, 313 I. C. C. 23 (1960) [R. 4-75] as unlawful under the terms of Section 15a(3) of the Interstate Commerce Act.

Respectfully submitted,

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48. This Court has indicated that cost determinations are peculiarly a matter for the expertise of the Commission. See *New York v. United States*, 331 U. S. 284, 326, 328, 335.

VII
PROOF OF SERVICE

I, Carl Helmetag, Jr., Attorney for the Appellees and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 8th day of February, 1963, I served copies of the foregoing Brief of the Appellee-Railroads on the several parties by mailing copies thereof in duly addressed envelopes, with postage prepaid, as follows:

1. On the Appellant, United States of America, copies to the Honorable Robert Kennedy, Attorney General of the United States, Department of Justice, Washington 25, D. C., the Honorable Archibald Cox, The Solicitor General, Department of Justice, Washington 25, D. C., the Honorable Lee Loevinger, Assistant Attorney General, Department of Justice, Washington 25, D. C., and Robert C. Zampano, Esq., United States Attorney for the District of Connecticut, Federal Building, New Haven, Conn.

2. On the Appellant, Interstate Commerce Commission, copies to the Honorable Robert W. Ginnane, its General Counsel, and B. Franklin Taylor, Jr., Esq., its Associate General Counsel.

3. On the Appellant, Sea-Land Service, Inc., copies to its attorneys Warren Price, Jr., Esq., 1000 Vermont Avenue, N. W., Washington 5, D. C., Albert W. Cretella, Esq., 153 Court Street, New Haven 10, Conn., and William H. Armbrecht, Jr., Esq., Merchants National Bank Building, Mobile, Ala. (air mail postage prepaid).

4. On the Appellant, Seatrain Lines, Inc., copies to its attorneys Ralph D. Ray, Esq. and Edmund E. Harvey, Esq., Chadbourne, Parke, Whiteside & Wolff, 25 Broadway, New York 4, N. Y., Morris Tyler, Esq., Gumbart, Corbin, Tyler

& Cooper, 205 Church Street, New Haven, Conn., and Warren E. Baker, Esq., Shoreham Building, Washington 5, D. C.

5. On the *amicus curiae*, Waterways Freight Bureau, copies to its attorney Samuel H. Moerman, Esq., Investment Building, Washington 5, D. C.

6. On the *amicus curiae*, American Trucking Associations, Inc. and National Motor Freight Traffic Association, Inc., copies to its attorneys Peter T. Beardsley, Esq., 1616 P Street, N. W., Washington, D. C., and Bryce Rea, Jr., Esq., Munsey Building, Washington 4, D. C.

7. On the *amicus curiae*, National Industrial Traffic League, copies to its attorney Dickson R. Loos, Esq., Munsey Building, Washington 4, D. C.

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